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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DANIELLE HARMON, Plaintiff and Appellant, v. ROY WAISMAN et al., Defendants and Respondents.	B287252 (Los Angeles County Super. Ct. No. BC647328)

APPEAL from a judgment of the Superior Court of Los Angeles County. William D. Stewart, Judge. Affirmed in part, reversed in part.

Law Offices of Vincent W. Davis & Associates, Carol A. Baidas and Viktor Ginko for Plaintiff and Appellant.

Koletsky, Mancini, Feldman & Morrow, Marc S. Feldman and Kristyn J. Mintesnot for Defendants and Respondents.

Plaintiff and appellant Danielle Harmon (Plaintiff) filed a complaint against Roy Waisman and Michael Sharr Inc. (together, Defendants) arising out of her lease of a residential property. Plaintiff previously filed a claim against Defendants in small claims court, which resulted in a judgment in Defendants' favor. Based on that judgment, Defendants demurred to the complaint, arguing Plaintiff's claims are barred by "res judicata and/or collateral estoppel." The trial court sustained the demurrer without leave to amend and dismissed the case. Plaintiff appealed. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, Plaintiff and a co-tenant began leasing a house in Tujunga owned by the Freda Spar Trust. Waisman is the trustee of the Freda Spar Trust, and Michael Sharr Inc. managed the property under the name S.I.G. Property Management (SIG). Plaintiff vacated the house on August 11, 2015.

Small Claims Action

On December 17, 2015, Plaintiff filed a claim in small claims court alleging Defendants "did not return security deposit with proper information to prove why they were keeping it. Did not provide receipts and claimed damages I did not do." Plaintiff sought $7,950 from Defendants, consisting of the $2,650 security deposit and a "bad faith penalty" of $5,300.

Defendants responded by filing their own claims against Plaintiff in the same action. Defendants asserted Plaintiff owed them $8,441.72 for unpaid rent, late fees, cleaning costs, attorney fees, and damage to the rental property.

Following a February 22, 2016 hearing, the court issued a written decision. The court summarized the case as follows:

"The dispute before the Court . . . comes down to whether landlord properly withheld some or all of Plaintiff's security deposit and/or whether Plaintiff is liable to Defendant for damage to the premises. The Court notes, but finds irrelevant to the issues before it, some of the past history between the parties including whether Plaintiff did or did not have an 'unauthorized occupant'; whether Defendant did or did not 'retaliate' against Plaintiff; and whether Defendant properly or improperly served the 60 day notice upon Plaintiff's minor son. [¶] . . . Plaintiff contends that no rent was due . . . because the unit was in 'non-working order.' The problem relates to mold. The parties both put before the Court mold investigation reports and correspondence to and from municipal authorities. There is no question there was mold present, that it required remediation and was very unpleasant and emotionally exhausting to Plaintiff. There appears to be no real dispute that by July 22, 2015 the mold problem was remediated. The issue is this: did the mold problem, and its remediation, render the unit 'uninhabitable'?"

The court found that the "unit was not entirely uninhabitable due to the presence of mold and the subsequent remediation in the hallway bathroom. . . . But not having a major bathroom available for a substantial length of time does require, equitably, an abatement of rent on the theory that Plaintiff was not receiving the benefit of her contract with Defendant." Accordingly, the court reduced Defendants' claim for back rent by 33 percent. The court also found Plaintiff caused nearly $2,000 in damages to the property. After subtracting the back rent and damages from the security deposit, the court

determined Plaintiff owed Defendants $2,220. The court also awarded Defendants $115 in costs, but denied their request for attorney fees and late fees.

Present Complaint

After the small claims court issued its judgment, Plaintiff brought the present action against Defendants. The operative first amended complaint sets forth the following factual history. In February 2015, Plaintiff's co-tenant complained to SIG about mold in the bathtub. Defendants did not immediately repair the problem. Instead, on May 12, 2015, Defendants served Plaintiff with notice that they were increasing her rent by $180 per month. The next day, Defendants attempted to serve Plaintiff with a 60-Day Notice to Move Out, leaving the notice with her minor son.

Plaintiff subsequently filed a complaint about the mold with the Los Angeles County Department of Public Health (DPH). DPH ordered Defendants to correct the problem within a month. Plaintiff also complained again to Defendants about the mold, and about what she asserted was the wrongful service of both a notice to change the terms of the lease and a move out notice. A few weeks later, Defendants served another 60-Day Notice to Move Out, again leaving the notice with Plaintiff's minor son.

On June 2, 2015, Defendants began to remodel the bathroom. The complaint alleges the work stopped within a few weeks, and a proper mold remediation was never completed. That same month, Plaintiff underwent a blood test which revealed "a presence of allergic symptoms." A later test indicated "Plaintiff might be allergic to . . . an allergen that may cause

asthma symptoms." On July 2, 2015, DPH inspected the unit and still found suspected mold in two bathrooms and the kitchen.

Between June 9 and July 30, 2015, Defendants served Plaintiff with 10 Notices to Enter the property.

Plaintiff asserted "causes of action" for (1) breach of lease agreement; (2) breach of the implied warranty of habitability and quiet enjoyment; (3) wrongful eviction; (4) breach of the implied covenant of good faith and fair dealing; (5) negligence; and (6) negligence per se. The complaint alleges Defendants' failure to repair the mold was negligent and constituted a breach of the express terms of the lease agreement, the implied warranty of habitability, and the implied covenant of good faith and fair dealing. The complaint also alleges Defendants breached the implied "warranty of quiet enjoyment" by serving numerous notices to enter over a less than two-month period. In addition, the complaint asserts Defendants violated Civil Code section 1942.5, by increasing Plaintiff's rent, threatening to evict her, and delaying repairs, all in retaliation for Plaintiff complaining about the mold and reporting the conditions to DPH. The complaint asserts that, as a result of Defendants' conduct, Plaintiff was forced to pay for an uninhabitable rental property, required medical care, lost earnings, suffered property damage, and experienced severe emotional distress.

Defendants' Demurrer

Defendants demurred to the complaint on the ground that Plaintiff's claims are barred by "res judicata and/or collateral estoppel." Defendants contended all of Plaintiff's claims "arise from the alleged 'uninhabitable rental property' that was already adjudicated in the small claims court." Defendants pointed out that Plaintiff argued in the small claims action that no rent was

due while the unit was in " 'non-working order,' " and the parties put before the small claims court mold investigation reports and correspondence with municipal authorities.

Plaintiff responded that res judicata and collateral estoppel are inapplicable because, unlike the present action, she did not seek damages in the small claims action related to Defendants' harassment and failure to repair the mold. Plaintiff alternatively argued that any issues determined in a small claims action may not be given collateral estoppel effect in a subsequent superior court action.

The trial court sustained the demurrer without leave to amend and dismissed the case. Plaintiff timely appealed.

DISCUSSION

Plaintiff contends the trial court erred in sustaining the demurrer based on res judicata and/or collateral estoppel. She asserts her complaint presents claims and issues that were not asserted or decided in the small claims action. We agree in part.

I. Applicable Legal Principles

When reviewing an order sustaining a demurrer, this court's task is to independently determine whether the facts alleged in the complaint are sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) At this stage in the proceedings, "[w]hether the plaintiff will ultimately be able to prove the complaint's allegations is not relevant. [Citation.]" (*Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299, 304.) "Whether the doctrine of res judicata

applies in a particular case is [also] a question of law which we review de novo." (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 228.)

The doctrine of res judicata encompasses both claim preclusion and issue preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*).) Claim preclusion bars "relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*).) In contrast, issue preclusion, also known as collateral estoppel, "precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828–829.) Defendants demurred to the complaint on both grounds.

II. Claim Preclusion Bars Plaintiff's Claims Based on Uninhabitability of the Property

We first address whether Plaintiff's claims are barred by claim preclusion. "Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." (*DKN Holdings, supra*, 61 Cal.4th at p. 824.) For purposes of claim preclusion, "[t]wo proceedings are on the same cause of action if they are based on the same 'primary right.' [Citation.]" (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.) Here, there is no dispute that the same parties are involved in both proceedings and the small claims action resulted in a final judgment on the merits. The only contested issue is whether the two actions involve the same causes of action, which requires consideration of the

primary rights at issue in each.

" '[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." [Citation.] The primary right must also be distinguished from the *remedy* sought: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." [Citation.]' " (*Mycogen, supra,* 28 Cal.4th at p. 904.)

Plaintiff argues the small claims action was limited to a single claim for the return of her security deposit. Yet, the scope of the action was significantly broader than Plaintiff suggests. When Plaintiff initiated the action, it was undisputed that she had failed to pay rent for a two-and-a-half-month period. Because a landlord may use a security deposit as compensation for a tenant's default in the payment of rent (see Civ. Code, § 1950.5), Plaintiff could recover her full security deposit only if she showed that no rent was due for that period. To address that issue, Plaintiff presented evidence that Defendants failed to immediately remediate a mold problem, which she argued rendered the unit in "non-working order" and entitled her to an abatement of rent.[1] Thus, Plaintiff sought to vindicate in the small claims action not only her right to return of the security

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[1] It also appears that Plaintiff asserted the habitability issue as an affirmative defense to Defendants' separate claim for back rent.

deposit, but also her primary right to habitable premises. The court, in turn, necessarily decided whether Defendants violated those rights.

The next step in the claim preclusion analysis is to determine whether Plaintiff seeks to vindicate the same primary rights in the present action. The bulk of Plaintiff's claims in this case are premised on Defendants' alleged failure to remediate a mold problem, which purportedly rendered the rental unit uninhabitable. Although Plaintiff asserts that Defendants are liable for such conduct under several legal theories (e.g., breach of lease, breach of the implied warranty of habitability, breach of the implied covenant of good faith and fair dealing, negligence, and negligence per se), the claims all seek vindication of a single primary right: Plaintiff's right to habitable premises. Plaintiff sought to vindicate the same primary right in the small claims action, thus all her claims that arise from Defendants' alleged failure to remediate the uninhabitable conditions are barred. (See *Zimmerman v. Stotter* (1984) 160 Cal.App.3d 1067, 1074 ["Appellant may not now relitigate this same primary right (the right to possession) which was necessarily determined in the unlawful detainer judgment."].)

Plaintiff argues such claims are not barred because she did not raise, and the small claims court did not "conclusively resolve," numerous issues related to the uninhabitable conditions, such as whether she was required to seek medical attention, whether Defendants acted negligently and violated statutes, and whether she suffered lost earnings, emotional distress, and property damage. That these theories or particular remedies were not litigated or decided in the small claims action is irrelevant. Under the claim preclusion aspect of res judicata,

"[i]f the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable.' " (*Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 96 Cal.App.4th 387, 402.) Here, each of these matters relates to the same cause of action and each could have been raised and litigated in the small claims proceeding. Plaintiff's failure to do so precludes her from raising them in this case.

III. Claim Preclusion Does Not Bar Plaintiff's Quiet Enjoyment Claims Based on Notices to Enter or Her Retaliation Claims

Although Plaintiff is precluded from asserting most of her claims, she is not barred from asserting all of them. In addition to her habitability claims, Plaintiff contends Defendants retaliated against her for reporting the mold problem, in violation of Civil Code section 1942.5, by increasing her rent, serving notices to quit, and delaying repairs to her rental unit.[2] This claim arises out of the alleged violation of Plaintiff's primary right to be free from retaliation for exercising certain lawful rights, including the right to report untenantable conditions. (See Civ. Code, § 1942.5; *cf. George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1483 [Fair

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[2] Plaintiff's complaint groups these allegations in one cause of action titled "wrongful eviction."

Employment and Housing Act protects the primary right to be free from retaliation for opposing discrimination, which is distinct from the primary right to continued employment]; *Zimmerman v. Stotter, supra,* 160 Cal.App.3d at p. 1075 [landlord's abuse of right to evict tenant violates distinct primary right from the tenant's right to possession of the property].)

Plaintiff's retaliation claims do not seek vindication of her right to habitable premises. Indeed, Plaintiff presented purported evidence of Defendants' retaliation in the small claims action, but the court correctly disregarded the issue as irrelevant to the claims before it. Because Plaintiff's retaliation claims concern alleged violations of a different primary right than those asserted in the small claims action, she is free to pursue them in this proceeding.

The same is true of Plaintiff's claim that Defendants violated the implied "warranty of quiet enjoyment" by repeatedly serving notices to enter her unit. In support of the second cause of action for "breach of implied covenant of habitability and quiet enjoyment," the complaint alleges: "Defendants breached [the warranty of quiet enjoyment] and the implied warranty of habitability by failing to correct the substandard conditions complained of herein. Defendants breached the warranty of quiet enjoyment by serving 10 24-Hour Notices to Enter in less than 2 months."

We have concluded above that Plaintiff is barred from re-litigating the habitability claims, regardless of how they are couched in the different causes of action. But the complaint's "second cause of action," liberally construed, separately alleges Defendants breached the implied covenant of quiet enjoyment by serving repeated notices to enter. (*Rufini v. CitiMortgage, Inc.,*

supra, 227 Cal.App.4th at p. 304 [reviewing court construes the complaint liberally with a view to substantial justice between the parties].) The claim seeks vindication of Plaintiff's primary right to be free from interference with her use and enjoyment of the leased premises (see *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 676 [noting the primary right to "undisturbed enjoyment of property"]); it is unrelated to her right to habitable premises. (*Mycogen, supra,* 28 Cal.4th at p. 908 [no claim preclusion when there are separate and distinct covenants breached at different times].) Accordingly, Plaintiff is not barred from pursuing her quiet enjoyment claim to the extent it is based on the alleged service of repeated notices to enter rather than the habitability of the property.

IV. Issue Preclusion Does Not Bar the Retaliation or Notice of Entry Claims

Defendants alternatively contend that issue preclusion principles bar Plaintiff's claims.[3] We disagree. Issue preclusion "applies (1) after final adjudication (2) of an identical issue

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[3] There is some disagreement as to whether issue preclusion principles can be asserted against a plaintiff in a prior small claims action. (Compare *Pitzen v. Superior Court* (2004) 120 Cal.App.4th 1374, 1386 ["we can perceive of no rationale for refusing to afford collateral estoppel effect to claims litigated and decided *against* a small claims plaintiff"] with *Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 865–871 [collateral estoppel has no application to small claims judgments].) We need not address this question because, for the reasons we discuss *infra*, the issues decided in the small claims action do not bar Plaintiff's retaliation-related claims or claims regarding interference with her use of the property due to the notices of entry. Plaintiff's other claims are barred by *claim* preclusion.

(3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings, supra*, 61 Cal.4th at p. 825.) Not all issues raised in Plaintiff's complaint were actually litigated and necessarily decided in the small claims action.

Defendants, in fact, concede the only issue decided in the small claims action that is relevant to Plaintiff's current claims is whether the mold rendered the rental unit uninhabitable. That issue is distinct from Plaintiff's quiet enjoyment claim premised on Defendants' service of notices to enter. Similarly, the small claims court's decision on the habitability issue did not encompass or necessarily decide Plaintiff's claims that Defendants retaliated against her by raising her rent, serving notices to quit, or delaying repairs. As such, the prior determination of the habitability issue is not a complete bar to Plaintiff's retaliation claims.

DISPOSITION

The judgment is reversed as to Plaintiff's claim that Defendants breached the "warranty of quiet enjoyment" by serving repeated notices to enter the property, and as to the retaliation claims. The judgment is affirmed in all other respects. The parties shall bear their own costs on appeal.

ADAMS, J.*

We concur: GRIMES, Acting P. J. WILEY, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.